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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Constitutional Provision and Statutes Involved.

The only constitutional or statutory provision directly involved here, or upon the validity or application of which the court below passed, is section 26 of Article I of the Constitution of the State of California, added in 1964 as the result of the vote of the California electorate.[1] The other provisions to which petitioners refer [see, *e.g.*, Pet. 3[2]] are only incidentally involved as showing the nature and extent of the operation and effect of section 26.

[1]For convenience this provision is hereinafter referred to merely as *"section 26."* The official edition in which it is found is California Statutes, 1965, vol. 1, p. A-15.

[2]The following abbreviations are used in this Brief:
Pet.:—Petition for a Writ of Certiorari herein.
App.:—Appendix to Petition for a Writ of Certiorari.
Clk. Tr.:—Clerk's Transcript on Appeal in *Mulkey* below.

For an understanding of the abridging effects of section 26 upon the constitutional rights of respondents and those similarly situated, more is needed than the bare bones of the language of the section. The contemporary context in which and the purpose for which section 26 was adopted bring those effects into readily graspable prominence. We supply the needed data in that regard. (See pp. 4-7, *infra.*]

Restatement of the Questions Presented.

1. For the expressly avowed purpose of permitting and enabling persons to discriminate on racial or religious grounds in the sale, rental or leasing of residential property, an amendment to the State's constitution prohibits the State and all of its subdivisions and agencies from limiting, abridging or denying the right of a person to refuse to sell, rent or lease that kind of property to such person as he in his absolute discretion chooses. Does this amendment so involve the State in the racial discrimination that ensues and which is sought to be justified by reliance upon it, as to be, in relation to those discriminated against, a denial by the State of equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States?[3]

The highest court of the State held that there was such a denial. [*Mulkey v. Reitman,* 64 Cal. 2d ...., 64 Adv. Cal. 557, 50 Cal. Rptr. 881, 413 P. 2d 825; *App.,* 35-57; *Prendergast v. Snyder,* 64 Cal. 2d ...., 64 Adv. Cal. 591, 50 Cal. Rptr. 903, 413 P. 2d 847.]

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[3]The questions numbered 2, 3 and 5 in the petition, p. 4, so far as raised below, are but expansive statements of narrower questions that are subsidiary to and comprised in petitioner's question number 1 [*Pet.,* 3], especially as that question is restated in the footnoted text above. Petitioners' question no. 4 is restated immediately next, p. 3, *infra.*

2. Is it a denial of equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States for a State, acting through its judicial department, to assist and enforce the eviction of tenants of an apartment, validly in possession thereof, when the eviction is sought solely because, as it was later ascertained, the husband of the tenant with whom the rental agreement was made (a white woman) is a negro?

The court below, while noting that decision of this question was unnecessary to its judgment, said that it would be such a denial for the State so to act. [*Prendergast v. Snyder, supra,* 64 Cal. 2d ....., 64 Adv. Cal. 591, 50 Cal. Rptr. 903, 413 P. 2d 847; *App.*, 87-91.]

Supplement to Statement of the Cases.

Petitioners' Statement [*Pet.* 2-3, 4-5] needs supplementation, as we have already intimated, p. 2, *supra*, in respect of the circumstances leading to adoption of section 26.[4]

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[4]Respondents asked the Court below to notice judicially the facts leading to the adoption of section 26, saying in that regard in their Opening Brief, p. 7, that "the measure [section 26] cannot be read or interpreted apart from the conditions that gave rise to it, or from the purpose it was designed to subserve. . . . Common knowledge is a source of judicial knowledge in any case [Cal. cits.]; and especially so when the constitutionality of legislation is at stake. 'The invalidity of a statute may be shown by things which will be judicially noticed.' [Cal. cits.]" The summary of the legislative facts contained in the opinion below [*App.*, 37-41] shows they were so noticed.

In California, political history of the world and matters of common knowledge are among judicially noticeable facts. [*Cal. Code of Civil Procedure*, sec. 1875, subd. 8; *Ventura County Harbor District v. Board of Supervisors*, 211 Cal. 271, 277, 295 Pac. 6, 8; *People v. Torres*, 56 Cal. 2d 864, 866, 17 Cal. Rptr. 496, 497, 366 P. 2d 823, 825.] The power of the State appellate courts to take judicial notice is as extensive as that of the trial

(This footnote is continued on the next page)

The Contemporary Context in Which the Legislation Involved Was Adopted.

For many years California has had a very limited form of Civil Rights statute. [Cal. Stats. 1905, c. 413, p. 553; *Cal. Civil Code,* secs. 51, 52.] By it, all citizens originally were declared to have an equal right to service at places of public accommodation such as inns, hotels, restaurants, theaters and the like; and one denied that right on racial grounds was given a cause of action to recover his damages in an amount not less than $100.00. In 1959 the statute was amended to extend its proscription of discrimination to all business establishments; and the sanction for a violation was made recovery of actual damages and $250.00 in addition. [Cal. Stats. 1959, c. 1866, p. 4424.] In 1961, the statutory declaration of equal rights was made applicable to all persons.[5] [Cal. Stats. 1961, c. 1187, p. 2920.]

Before 1963 there was no statutory prohibition of racial discrimination by the owner of non-publicly assisted residential property in its sale, rental or leasing. Real estate brokers, and those engaged in the business

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courts [*Varcoe v. Lee*, 180 Cal. 338, 343, 181 Pac. 223, 225; *County of Marin v. Duffiey*, 144 Cal. App. 2d 30, 34, 330 P. 2d 721, 723]; and may be exercised even though the trial court failed or refused to do so. [*Rogers v. Cady*, 104 Cal. 288, 290, 38 Pac. 81; *People v. Stralla*, 14 Cal. 2d 617, 620, 96 P. 2d 941, 942; *People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883.] This Court's power of judicial notice is as extensive as that of the court whose judgment it is reviewing. [*Hanley v. Donoghue*, 116 U.S. 1, 6; *Chicago and Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622-623; *Adam v. Saenger*, 303 U.S. 59, 63; *Renaud v. Abbott*, 116 U.S. 277, 285.]

[5]The statute is now known as the Unruh Civil Rights Act. [Cal. Stats. 1959, c. 1866, p. 4424, sec. 1; *Cal. Civil Code*, sec. 51.] It was to recover damages under this Act for a refusal to rent an apartment to them solely because they were negroes that the Mulkeys brought the action, the dismissal of which in the trial court was reversed by the court below. [Clk. Tr. 2-5. *App.*, 35-57.]

of selling real estate, however, were held to be "business establishments" within the meaning of the Unruh Civil Rights Act. [*Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 611-612, 370 P. 2d 313, 315-316; *Lee v. O'Hara*, 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 618, 370 P. 2d 321, 322.] In 1959, racial discrimination in the sale, rental or leasing of "publicly assisted" housing was prohibited.[6] [Cal. Stats. 1959, c. 1681, p. 4074.]

By 1963 a high degree of *de facto* residential segregation along racial lines had developed in California.[7] In that year, efforts to bring about open housing culminated in the adoption of the Rumford Fair Housing Act. [Cal. Stats. 1963, c. 1853, p. 3823; *Cal. Health & Safety Code*, Div. 24, Part 5 (beginning with sec. 35700).] This Act prohibited discriminating in housing accommodations because of "race, color, religion, national

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[6]This statute was superseded and expressly repealed in 1963 by a comprehensive "open housing" statute, *i.e.*, the Rumford Fair Housing Act [Cal. Stats. 1963, c. 1853, p. 3823, sec. 1. See, pp. 5-6, *infra*.]

[7]Among the many sources from which the Court may inform its judicial knowledge of the facts summarized in the succeeding text above are the following, all of which, except the last one listed, were called to the attention of the court below:

U.S. Commission on Civil Rights, Report No. 4 (1961), *passim*.

Los Angeles County Commission on Human Relations. Population Housing in Los Angeles County (1963) pp. 2-4.

Jackson v. Pasadena School Dist., 59 Cal. 2d 876, 878-879, 31 Cal. Rptr. 606, 608, 382 P. 2d 878, 880.

University of California Extension Div., Race and Property (Diablo Press, 1964, Denton ed.) pp. 6-8.

Kaplan, Discrimination In California Housing, 50 Cal. Law Rev. 635, 644.

Cal. Commission For Fair Practices, *In A Nutshell*, The Proposed Fair Housing Law (1961), *passim*.

Selected 1963 Legislation, 38 Journal of the State Bar of California 719-720.

origin or ancestry" and declared such discrimination to be against the public policy of the State. [Cal. Stats. 1963, c. 1853, pp. 3823, 3824, sec. 2; *Cal. Health & Safety Code*; secs. 35700, 35720.] It also set up a comprehensive system of enforcing that prohibition. The system included provisions for investigation and mediation of complaints of discrimination, as well as for prevention or compelled cessation of it.[8] [Cal. Stats. 1963, c. 1853, p. 3825; *Cal. Health & Safety Code*, Div. 24, Part 5, Ch. 4, beginning with sec. 35730.]

Adoption of the Act was vigorously opposed by such real estate and property owners' organizations as the California Real Estate Association [see note 24, p. 24, *infra*] and the California Apartment Owners Association. Rebuffed as they were in the legislature, these opponents of the Rumford Fair Housing Act quickly commenced qualification of an initiative measure to undo what the legislature had done and to restore and secure freedom to discriminate. The ultimate result was the addition of section 26 to the State constitution.

As is required by California law [*Cal. Elections Code*, Div. 4, chap. 1, article 3 (beginning with section 3555)] submission of the measure to the electorate was accompanied by "official" arguments pro and con, a copy of which went to every registered voter in the State.[9]

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[8]A mere fragment of this comprehensive statute is printed by petitioners, see *App.*, 11.

[9]These "ballot arguments" are, in California, an accepted aid to ascertainment of legislative intention and purpose. [*People v. Ottey*, 5 Cal. 2d 714, 723-724, 56 P. 2d 193, 197-198; *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 515, 11 P. 2d 857, 860, quoting and approving the opinion in *Crooks v. People's Fin. etc. Co.*, 111 Cal. App. (Supp.) 769, 775-776, 292 Pac. 1065, 1067; *Crees v. Cal. State Board*, 213 Cal. App. 2d 195, 211, 28 Cal. Rptr. 621, 630-631.]

[See, *App.* 3-8] The argument in favor of the measure laid bare its purpose to permit and enable the carrying on of the practice of racial discrimination in the sale, rental and leasing of residential property. It did so in these words:

> ". . . this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.
>
> "Most owners of such property lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.
>
> * * *
>
> "Your 'Yes' vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another." [*App.*, 4.]

Section 26 as proposed and adopted did not expressly repeal the Rumford Act or any other statutory or constitutional provision. Whatever repealing effect it may have had was but the consequence to be implied from its positive prohibition, as a part of the State constitution, of any denial, limitation or abridgement of the right of any person "to decline to sell lease or rent [his] property to such person or persons as he, in his absolute discretion chooses."[10] That prohibition extends to the State and all of its subdivisions and agencies.

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[10]"Property" is so defined in section 26 as to confine it to residential or family dwelling property. [*App.*, 2.]

Reasons Why These Causes Should Not Be Reviewed by This Court.

Section 26 is not merely a repeal of conflicting anti-discrimination legislation. No more is it only a choice not to regulate certain types of private conduct. [*Pet.*, 9.] It is, rather, a complete disenablement of all California government, state-wide or local, from hitting directly at racial discrimination in the sale, rental or leasing of residential property. It erects freedom to discriminate into an impregnable right, secured by the State constitution and put beyond the regulation or control of government. As a consequence of the secure and untouchable position it thus gives to the right to discriminate, the section puts the State in the position of affirmatively authorizing and sanctioning, and of aiding and encouraging, indeed inviting, private persons to discriminate on racial grounds in the sale, rental or leasing of residential property. It was purposefully designed to bring about just that result. [See, pp. 6-7, *supra*, and pp. 12 (fn. 13), 15 (fn. 16), *infra*.] Thus, it involves the State in the intended and authorized discrimination which ensues and which, in the instant cases is, sought to be defended by the invocation of section 26. Viewed in that light, invalidation of section 26 under the Equal Protection Clause on the ground of its involvement of the State in racial discrimination is seen not to give rise to the numerous problems, or to be potentially productive of the consequences, to which petitioners direct their fears and forebodings. [See, *e.g.*, *Pet.*, 8-11, 13-14, 21-23. But see, pp. 10-23, *infra*.]

Furthermore, because of the section's breadth of reach, the stringency of its proscription, and the candidly confessd pro-discrimination nature of its purpose,

it is unique—unique to California, without near or similar counterpart anywhere else. The State court's decision holding the section obnoxious to the Equal Protection Clause does not, therefore, have any extra-territorial influence or national significance. By the same token, the federal interest in not having the guarantees of the Constitution of the United States ignored or flouted has been fully vindicated by the State court's declaration of unconstitutionality. In short, the questions presented have no real existence; the decision, because of the uniqueness of the operative facts, is of limited significance outside of California; and no violence has been done to the national constitution. So, there are not to be found in the instant record the conventional or required bases of certiorari jurisdiction. [Supreme Court of the United States, *Revised Rules*, rule 19, subd. 1(a). See, also, cases cited pp. 15, 17, *infra*.]

It, of course, adds nothing to the case that the unconstitutional provision is one adopted by the people acting directly, rather than by their elected representatives. [See, *Pet.* 2, 9-10.] The people's action was just as much the action of the State as a formal enactment adopted by the legislature would have been. The limitations of the national constitution bind the State in all of its manifold activities. Those limitations cannot be exceeded, whatever may be the means or agency by which the State seeks to act.[11] [*Lucas v. Forty-Fourth General*

[11]Every amendment to the State constitution must be adopted by popular vote [*Cal. Const.*, art. IV, sec. 1, and art. XVIII], as is no doubt true in many other states. If the people acting in such a legislative capacity are not bound by the limitations upon state action imposed by the Constitution of the United States, there has long been a heretofore unnoticed means of es-

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Assembly of Colorado, 377 U.S. 713, 736-737; *McCulloch v. Maryland*, 4 Wheat. 316, 405-406.]

1. The Court Below Did Not Decide That Anti-Discrimination Legislation Once Adopted Could Not Be Repealed.

The difficult problems that petitioners profess to see arising because of the decision below [see, *Pet.* 9-11] stem from the unjustified assumption that what was held was that a State, having once adopted a policy against racial discrimination by private persons, may not abandon or change it; in other words, that what was held was that it is a denial of equal protection to repeal statutes that prohibit racial discrimination. That is a pretty distorted, in fact a wholly false, view of what was done.

The cases here, as presented and decided below, did not involve repeal alone. At most, repeal came in only as a collateral or implied incident of the substantive provision that made freedom to discriminate a secured and inviolable right under the State constitution. [See, p. 7, *supra*.] This substantive provision was held unconstitutional, because it involved the State in racial discrimination. Consequently, the question whether section 26 could be given effect as a repeal of the existing and inconsistent legislation prohibiting racial discrimination, depended on whether the implied or incidental

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cape from limitations of the Constitution that on occasion other States have resisted or sought to evade.

Other amendments to the constitution of California have been held invalid. [See, *e.g.*, *Speiser v. Randall*, 357 U.S. 513; *First Unitarian Church v. Los Angeles*, 357 U.S. 545.]

repealing effect of the section could be severed from its substantive provision. The State court held it could not, on grounds that are completely supportable. [See, *App.*, 54-56.] The decision in that respect is beyond review by this Court; for severability is a question of State law, upon which this Court is bound by the State court's decision. [*Morey v. Doud*, 354 U.S. 457, 470; *Dorchy v. Kansas*, 264 U.S. 286, 290; *Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562.]

So far as repeal is concerned, the upshot of the decision is not that repeal of the existing policy against racial discrimination was objectionable on constitutional grounds, but only that as an implied repeal the section was ineffective. It was ineffective, because its repealing effect was inseparable from, indeed, was only an incident of the substantive provision which, in turn, was invalid on other grounds. It followed that this incidental effect, even though otherwise valid, fell with the collapse of the invalid part.[12]

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[12]The rule is settled in California that where a provision includes both valid and invalid restrictions "and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, the provision is void in its entirety . . ." [*Fort v. Civil Service Com.*, 61 Cal. 2d 331, 339, 38 Cal. Rptr. 625, 630, 392 P. 2d 385, 390; *In re Portnoy*, 21 Cal. 2d 237, 242, 131 P. 2d 1, 3; *Wills v. Austin*, 53 Cal. 152, 178-179.] So, when the invalid part is so blended with the rest that "the defect cannot be cured by excising any word or group of words" the valid part also falls. [*In re Blaney*, 30 Cal. 2d 643, 655-656, 184 P. 2d 892, 900.] That is the case with section 26. Its repealing effect depends on the implication to be drawn from the inconsistency between the substantive part of section 26 (which was the part held invalid) and the legislation said to be repealed. Its effect as a repeal, *ex hypothesi* valid by itself, is inextricably blended with the invalid part of the section and, therefore, takes on that invalidity. The court below, as a matter of state law, expressly so held. [*App.*, 54-56.]

Thus, we see, that the court below did not hold that the Equal Protection Clause forbade giving effect to section 26 as a repeal of the Rumford Fair Housing Act and the Unruh Civil Rights Act. The section's effect as a repeal was invalidated upon a different ground, and a state ground at that.[13]

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[13]So far as section 26 is a repeal of existing anti-discrimination legislation, it was intentionally and purposefully made so in order to clear the way for private discrimination in the housing field. [See, pp. 6-8, *supra*.] In that operation, it is subject to the rationale employed by this Court in *Terry v. Adams*, 345 U.S. 461, 465-466 in approving the decisions of the Court of Appeals in *Rice v. Elmore*, 4 Cir., 165 F. 2d 387, *cert. den.* 333 U.S. 875 and *Baskin v. Brown*, 4 Cir., 174 F. 2d 391; and in reversing a state court judgment in *Evans v. Newton*, 382 U.S. 296.

In the *Rice* and *Baskin* cases, South Carolina, for the purpose of avoiding constitutional restrictions that prevented the State from barring negroes from voting in the Democratic Party primary, repealed, as this Court said, "every trace of statutory or constitutional control of the Democratic primaries . . ." [*Terry v. Adams*, *supra*, 345 U.S. at 465-466.] As was readily foreseeable, the Party as a private organization, holding its own internal election, accomplished the sought-for exclusion. Thus, the exclusion of negroes from those primaries was entirely private action, not commanded, controlled, regulated or aided by the State. The court, however, looked through the form of the words of mere repeal to the substance of the realistic statutory purpose and held that it was the State that had acted to exclude.

In *Evans*, the state court by means of an ordinary and on its face wholly innocuous judgment, accepted the resignation of a city as trustee of private trust property dedicated to park uses, and appointed private persons as substitute trustees. The readily inferrable though unexpressed purpose, however, was to enable the park to be operated, as the city could not constitutionally operate it, to the exclusion of negroes. Once again looking through the harmless form of words to the discriminatory purpose, the court held that by the judgment the State had acted unconstitutionally.

The same vitiating purpose is found in section 26. [See, pp. 6-8, *supra*.] While seemingly sympathetic to the rationale adumbrated in this note [see, *App.*, 47-49], the court below did not put its decision upon that ground. There is, therefore, no question in that respect to be reviewed. [See, *Black v. Cutter Laboratories*, 351 U.S. 292, 297. *Cf.*, *Morrison v. Watson*, 154 U.S. 111, 115.]

2. The Principle That a State May Be Involved in Private Discriminatory Conduct by Acts Falling Short of Compulsion Is Well Established. The Question of Involvement at Bar Is Not of Certiorari Quality but Only One of Appreciation of the Facts Showing Such Involvement.

There is, of course, nothing new in the proposition that there may be "state action" within the meaning of the Fourteenth Amendment even when there has been no formal exercise of a governmental power or any official act of the governmental establishment.[14] Private action of a sort that, if officially or formally done by the State would come within the proscription of that Amendment, still comes within it if it is conduct for which the State may be said to be fairly responsible. [See, *Terry v. Adams, supra,* 345 U.S. at 473, Frankfurter, *J.*, concurring.] Governmental sanction of private conduct, it is settled, "need not reach the level of complusion to clothe what is otherwise private discrimination with 'state action.'" [*Simkins v. Cone Memorial Hospital,* 4 Cir. (*en banc*), 323 F. 2d 959, 968, *cert. den.* 376 U.S. 938.] There is no closed category of acts or conduct that will so involve the State in private racial discrimination as to make the Fourteenth Amendment

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[14]If such formal or official action is needed, we have it in the instant case. Section 26 is a formal and official legislative act of the State of California, effected strictly in accordance with the mode prescribed by its organic law. [Cal. Const., art. IV, sec. 1, and art. XVIII.] To bring that "state action" within the proscription of the Fourteenth Amendment it is only necessary that it should have had the effect of denying some person equal protection of the laws or of taking his property or liberty without due process of law. When such a denial or taking is effected by private action the question is whether the State is fairly responsible for or significantly involved in the private action. [See, pp. 13-14, *infra.*]

applicable.[15] [*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 725-726.]

In any given case, therefore, the question whether the State is involved by acts that fall short of official compulsion, is not one of law or constitutional principle.

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[15]Among the many kinds of conduct that have been held to amount to State involvement are: Exhortations by city officers not to protest racial segregation [*Lombard v. Louisiana*, 373 U.S. 267, 269-270]; the inciting effect, in view of known private attitudes, of requiring the race of candidates to be printed on election ballots [*Anderson v. Martin*, 375 U.S. 399]; the interplay of private and state acts bringing about subjection of negroes to private reprisal as the consequence of State-compelled disclosure of their membership in a locally unpopular organization [*N.A.A.C.P. v. Alabama*, 375 U.S. 449, 463]; leasing premises upon which private discrimination takes place, though the discrimination is not commanded or suggested by the State [*Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, *reversing* 6 Cir., 202 F. 2d 275; *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715; *Derrington v. Plummer*, 5 Cir., 240 F. 2d 922, 925-926]; encouraging use of racially discriminatory deed covenants, by allowing damages for breach [*Barrows v. Jackson*, 346 U.S. 249, 254]; administering a discriminatory private trust [*Pennsylvania v. Board of Directors*, 353 U.S. 230]; substituting private persons for a city as trustee of a private trust in order to permit discriminatory operation of trust property [*Evans v. Newton*, *supra*, 382 U.S. 296]; financial assistance to businesses or establishments in which discrimination is carried on [*Simkins v. Cone Memorial Hospital*, *supra*, 323 F. 2d at 965-968]; permitting private regulation of primary elections, without any governmental control or suggestion, but for the implicit purpose of excluding negroes [*Terry v. Adams*, *supra*, 345 U.S. at 465-466, approving *Baskin v. Brown*, *supra*, 174 F. 2d 391, and *Rice v. Elmore*, *supra*, 165 F. 2d 387]; permitting or tolerating discrimination under authority but not the compulsion of state law [*McCabe v. Atchison, etc. Ry. Co.*, 235 U.S. 151, 161-162; and *cf.*, *Public Utilities Com. v. Pollak*, 343 U.S. 451, and *Marsh v. Alabama*, 326 U.S. 501]; permitting *de facto* school segregation caused by neighborhood private residential patterns [*Jackson v. Pasadena School Dist.*, *supra*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878; *Branche v. Board of Education*, E.D.N.Y., 204 F. Supp. 150]; encouraging discrimination by burdening integrated operation of places of public accommodation. [*Robinson v. Florida*, 380 U.S. 153, 156-157.]

The principle has been established. [Cases cited, pp. 13-14, *supra.*] The question is one of fact. There were at bar ample factual indicia of State involvement.[16] Given the settled principle of law to which we have referred, the question here is only whether the court below correctly appreciated those facts in arriving at its conclusion that the State was involved. That is not the kind of a question for the review of which this Court's certiorari jurisdiction is ordinarily exercised. [See, *Houston Oil Co. v. Goodrich,* 245 U.S. 440; *General Talking Pic. Corp. v. Western Elec. Co.,* 304 U.S. 175, 178.] ". . . [W]here conclusions of [the court below] depend on appreciation of circumstances which admit of different interpretations . . ." the "usual rule is [one] of noninterference . . ." [*N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 503.]

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[16]The purpose of the enactment was to permit racial discrimination. That such discrimination would take place was a readily foreseeable event. The enactment went beyond passive acquiescence in the discrimination, but effectively and affirmatively secured it against any governmental sanctions or penalties and made it mandatory for the State to permit it. In these ways the State authorized and sanctioned, and, indeed invited and encouraged, private discrimination. Further, as a consequence of private discrimination, *de facto* zoning or districting of residential areas along racial lines was and is brought about and maintained. By permitting that to be done, the important governmental function of zoning is left in private hands and permitted to be discriminatorily exercised [see, St. Antoine *Color Blindness But Not Myopia,* 59 Mich. Law Rev. 993, 999-1001], whereas such an exercise of it directly by the government undoubtedly would be a denial of Fourteenth Amendment rights. [*Buchanan v. Warley,* 245 U.S. 60; *Harmon v. Tyler,* 273 U.S. 668, reversing, *per curiam, Tyler v. Harmon,* 158 La. 439, 104 So. 200, 160 La. 943, 107 So. 704; *Birmingham v. Monk,* 5 Cir., 185 F. 2d 859, 862, *cert. den.* 341 U.S. 940; *Richmond v. Deans,* 4 Cir., 37 F. 2d 712, *affirmed* 281 U.S. 704.]

3. Because of the Exceptional and Unique Character of the California Legislation, the Constitutional Problem Involved in the Instant Cases Is Not of General Public Importance.

Petitioners have presented an elaborate "Survey of State and Municipal Laws Regulating Racial Discrimination in Housing." [*App.*, 15-34.] It shows that the instant case is unique to California. Nothing like the California statutory posture is to be found elsewhere; and even in California it is confined to section 26—the only variant, since earliest days of statehood, from the State's consistent pattern of treating racial discrimination as against public policy.[17] The instant decisions effectively dispose of that variant.

No doubt, as petitioners say, a substantial number of states and cities have statutes regulating or prohibiting private racial discrimination in housing [*App.*, 16, 25] —statutes that are undoubtedly constitutional. [*Massachusetts Com. Against Discrimination v. Colangelo*,

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[17]Racial discrimination has been declared to be contrary to the State's public policy in, for example, availability of the services and facilities of business establishments [*Cal. Civil Code*, sec. 51]; in community redevelopment or urban renewal projects [*Cal. Health & Safety Code*, secs. 33050, 33435]; in housing [*ibid.*, sec. 35700]; in use of public beaches [*Cal. Gov. Code*, secs. 54091, 54092]; and in employment. [*Cal. Labor Code*, secs. 1411, 1412.] A fuller compilation is found in *App.*, 12-14.

Because of that policy, and the same general policy prescribed for the Nation by the Fourteenth Amendment, California's courts have worked out a remedy for refusal, on the ground of their race, to admit negroes to membership in labor unions [*James v. Marinship Corp.*, 25 Cal. 2d 751, 155 P. 2d 329; *Williams v. International Brotherhood*, 27 Cal. 2d 586, 165 P. 2d 903]; declared *de facto* school segregation unconstitutional and remediable [*Jackson v. Pasadena School Dist.*, *supra*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878]; and invalidated restrictions on ownership of land by Japanese. [*Sei Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617.]

344 Mass. 387, 18 N.E. 2d 595; *Colorado Anti-Discrimination Com. v. Case*, 151 Colo. 235, 380 P. 2d 34. See, *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94; *District of Columbia v. Thompson Co.*, 346 U.S. 100, 109; *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 41 Douglas, *J.*, concurring.] But, there is not a single state or other governmental entity that has disenabled itself, as California did in section 26, from adopting such statutes or ordinances, *i.e.*, from ever prohibiting or directly regulating private racial discrimination in housing; and that has also withdrawn existing prohibition of racial discriminetion in order that it may be resumed and carried on under the State's protection. Petitioners refer to no statute or ordinance comparable to section 26, and we know of none. Nowhere else, therefore, are there now or are there likely to be the problems of law and fact that section 26 brought about in California.

We do not deny, we need not deny, that in respect of those problems the instant decisions were of important significance to the economy and general welfare of the State of California. Because of the uniqueness of their factual bases, however, the decisions are without precedential or persuasive influence elsewhere. They are far from being national in scope or incidence. For these reasons, they are not of the kind to which the time and energies of this Court ought to be devoted. [See, *Layne and Bowler Corp. v. Western Well Wks.*, 261 U.S. 387, 393; *Rice v. Sioux City Cemetery*, 349 U.S. 70, 77-79.]

4. No Question Involving the Application of Shelley v. Kraemer, 334 U.S. 1, Was Decided by the Court Below. Decision Was Expressly Put on Other Grounds.

A substantial part of petitioners' reasons for urging that the writ of certiorari be granted, has to do with the supposedly erroneous interpretation of *Shelley v. Kraemer*, 334 U.S. 1, made below. [*Pet.* 17-25.] The argument is more hypothetical than real. It seems to be based on the reference in the opinion in the *Prendergast* case [*App.* 89-90] to *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309. That was an earlier decision of a California intermediate appellate court, in which reliance had been put on *Shelley*. But, in *Prendergast* the State Supreme Court, referring to *Abstract*, expressly said that it was "not required to rely upon that case in affirming the judgment herein . . ." [*App.*, 90.] So saying, it affirmed on the ground that it had held in *Mulkey* that "section 26, upon which defendant [petitioner] relies for the declaration of rights, is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment . . ."[18] [*App.* 90.]

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[18]In *Hill v. Miller*, 64 Cal. 2d ....., 64 Adv. Cal. 819, 50 Cal. Rptr. 908, 413 P. 2d 852, decided the same day, there was a similar reference to *Abstract*. [*App.* 94.] That decision is not here for review. The party against whom judgment went (plaintiff Clifton Hill) is not one of the petitioners [see *Pet.* 1 (note 1)]; nor is he otherwise here.

There was more discussion of *Shelley* in the memorandum opinion filed by the trial judge in *Prendergast*. [*App.* 79-87.] That opinion was, of course, superseded by the affirming opinion of the Supreme Court. [See, *Worthley v. Worthley*, 44 Cal. 2d 465, 472, 283 P. 2d 19, 24.] Being the opinion of a court of first instance, it is merged in the findings and judgment [*De Cou v. Howell*, 190 Cal. 741, 751, 214 Pac. 444, 448], and anyway, even in the State of its rendition, has no precedential value. [*Cf., Auto Equity Sales Inc. v. Superior Court*, 57 Cal. 2d 450, 455-456, 20 Cal. Rptr. 321, 323-324, 369 P. 2d 937, 939-940; *People v.*

Mulkey was no more based on any *Shelley* ground than was *Prendergast.*[19] Indeed, after noting and correctly stating the proposition for which *Shelley* stands [see, note 19, p. 19, *supra*], and the distinction of it sought to be made by petitioners [*App.* 46], the court below moved on to the real basis of its decision—that the prohibition of the Fourteenth Amendment "extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests . . ."[20] [*App.* 47-54.]

Thus, it appears that the court's discussion of *Shelley* was unnecessary to the result reached. "This

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Cowles, 142 Cal. App. 2d Supp. 865, 867; 298 P. 2d 732, 734; *Mueller v. Brown*, 221 Cal. App. 2d 319, 328, 34 Cal. Rptr. 474, 479; *Wheeler v. Kraner*, 21 Cal. App. 2d 460, 463, 69 P. 2d 881, 883.]

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[19]Reference was made to *Shelley* in the *Mulkey* opinion to show that in finding state action the court was "not limited to action by one who, cloaked with the authority of the state, acts as its designated representative . . ."; but that it could find such action "where the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purpose . . ." [*App.* 45.] The proposition for which *Shelley* stands, the court said, is that "when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved . . ." [*App.* 46.]

[20]That proposition, the court believed, was broader than and transcended *Shelley*. [*App.* 47.] It was derived [*App.* 47-52] from a synthesis of the results reached by and the discussion of this Court in *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715; *Evans v. Newton*, *supra*, 382 U.S. 296; the company town case [*Marsh v. Alabama*, 326 U.S. 501]; the "white primary" cases [*Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, *supra*, 345 U.S. 461; *Nixon v. Condon*, 286 U.S. 73; *Baskin v. Brown*, *supra*, 174 F. 2d 391; *Rice v. Elmore*, *supra*, 165 F. 2d 387]; the "sit-in" cases [*Robinson v. Florida*, 378 U.S. 153; *Bell v. Maryland*, 378 U.S. 22]; and the "encouragement of discrimination" cases [*Anderson v. Martin*, *supra*, 375 U.S. 399; *Barrows v. Jackson*, 346 U.S. 249.]

court," it has said, "reviews judgments, not statements in opinions . . ." [*Black v. Cutter Laboratories, supra,* 351 U.S. at 297.] To furnish the basis of certiorari jurisdiction, it is not enough that a question was raised or even that it was discussed by the court below; it must have been *necessarily* decided. [*De Saussure v. Gaillard,* 127 U.S. 216, 232; *Lynch v. New York,* 293 U.S. 52, 54; *Honeyman v. Hanan,* 300 U.S. 14, 18.] That was not done with the *Shelley* question to which petitioners devote so much of their attention.[21]

5. The Court Below Did Not Hold That the Fourteenth Amendment Imposes Upon the States a Duty to Provide a Remedy for Racial Discrimination. There Is, Therefore, No Conflict With Decisions Elsewhere Supposedly Holding There Is No Such Duty.

The conflict seen by petitioners between the instant decisions and those "of the Highest Courts in Other States . . . and with Certain Lower Federal Courts . . ." [*Pet.,* 25-26] is a non-existent one. It is created by petitioners' ascription to the court below of a decision it did not make. That court did not hold "that the failure of California to provide a remedy which it once

[21]The "psychiatric overtones" with which petitioners fear the courts may be overwhelmed [see, *Pet.* 21] are not the product of the instant decisions. If they exist at all which we seriously doubt, they are the product of this Court's original determination in *Shelley.* In the eighteen years that *Shelley* has been on the books, during which time the problems of racial discrimination have been uppermost in the country's consciousness, there has been no noticeable surge of cases seeking to bring "every dispute between members of different racial, religious or political groups" [*Pet.,* 21] within the ambit of the *Shelley* rationale. Indeed, petitioners here argued in the court below [see *Petition for Rehearing,* pp. 15-16] and they may not deny the assertion here, that *Shelley* has been rarely resorted to; and, "despite numerous ideal opportunities to dispose of controversies on [the California Supreme] Court's version of *Shelley,* the United States Supreme Court has refused to do so . . ."

provided against racial discrimination by the owners of private residential property violates the equal protection clause . . ."[22] [*Pet.*, 25.] What it did hold was that by disenabling itself from ever providing such a remedy, securing and protecting racial discrimination against governmental regulation or sanction, and purposefully permitting it to be carried on, the State had so involved itself in the ensuing and readily anticipatable private discrimination as to violate the equal protection clause. [*App.*, 43-54.]

It may be, as petitioners argue, although the cases they cite do not support their argument—it is unnecessary at the moment to consider the argument—that "the Fourteenth Amendment does not of its own force impose a duty upon the state to provide— or maintain —remedies against . . . discriminatory private conduct . . ." [*Pet.*, 25.] The court below held nothing to the contrary, even though, as we have noted [see note 22, p. 21, *supra*], an argument in favor of the imposition of such a duty was made by us. In point of fact, in the companion case of *Hill v. Miller*, 64 Cal. 2d ....., 64 Adv. Cal. 819, 821, 51 Cal. Rptr. 689, 690, 415 P. 2d 33, 34 (on rehearing), the court expressly relying on *Mulkey*, said: ". . . The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here . . ." [*App.* 93.]

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[22]We argued below, citing *Truax v. Corrigan*, 257 U.S. 312, that section 26 violated the Due Process Clause of the Fourteenth Amendment. This it did by withdrawing the State completely from the field of controlling racial discrimination, and prohibiting any state remedy for the irreparable injury caused by that discrimination. The court below, however, did not adopt that argument as a ground of decision. [See, *App.*, 44-45, 93.]

Once again, petitioners are asking this Court to review a question that is not here. The particular decision or holding they seek to have reviewed was not made. So, there is no reason why the attention of this Court should be devoted to any question in that regard. [See, cases cited, p. 15, *supra.*]

6. As Construed Below, Section 26 Was Not Merely a Choice to Leave Certain Evils Unregulated. It Was, Rather, an Affirmative Aid to and Encouragement of Discrimination. The Question of the Constitutionality of a Partial Choice Was Not, Therefore, Involved or Decided.

It may indeed be so that a state need not always "attack all evils in the same field simultaneously." [*Pet.* 24.] Nothing in the decisions here involved suggests or even intimates any deviation from that principle by the court below. Petitioners' point in this connection is irrelevant, for it rests on the question-begging assumption that all that section 26 did was to make a simple choice to leave certain evils in the field of racial discrimination unregulated. [See, *Pet.* 9.] Section 26, in fact, does very much more than that [see, pp. 6-8, 12 (fn 13), 15 (fn. 16) *supra*], as the court below fully recognized. It construed the section as in effect securing a right to discriminate and thus to be such an aid to or encouragement of the discrimination as to involve the State in it. [*App.*, 43, 52.] That construction of the meaning and scope of the local legislation is, of course, binding on this Court. [*Garner v. Louisiana*, 368 U.S. 157, 166; *De Saussure v. Gaillard, supra*, 127 U.S. at 232-233.]

Accepting the State court's construction, as we must, it is apparent that there was no basis for any question of the constitutionality of a partial choice and, conse-

quently, no need to make any decision in respect of it. Neither expressly nor impliedly did the court below make the ruling to which petitioners object. Here, as with other parts of their argument, they reach for a question not fairly presented by the instant record.

7. Only a Part of the Proceedings That Led to the Decisions Sought to Be Reviewed Has Been Brought Here. Consequently, a Complete Review or Disposition of Those Decisions Cannot Be Made.

First: The cases here sought to be reviewed are but two of seven cases decided together and upon the same grounds.[23] The judgments in the other cases are now final. [*Cal. Rules of Court,* sec. 24(a), West's Annotated California Codes, vol. 23, pt. I, p. 305.] Nothing that may be done in response to the petition now before this Court can affect the judgments in those other five cases. It would be anomalous, if not in fact a discrimination against the respondents here, to order review of only a part of what for all practical purposes was one case or proceeding. [See, note 24, p. 24, *infra.*]

Review and final decision conformably to petitioners' views would produce the paradoxical result of diametrically opposed judgments as against parties similarly situated. That dichotomous situation, should it occur, would not have been the consequence of a reasoned dis-

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[23]In addition to *Mulkey* and *Prendergast*, in respect of which the instant petition was filed, there were the following: *Peyton v. Barrington Plaza*, 64 Cal. 2d ....., 64 Adv. Cal. 594, 50 Cal. Rptr. 905, 413 P. 2d 849; *Hill v. Miller*, 64 Cal. 2d ....., 64 Adv. Cal. 598; 50 Cal. Rptr. 908, 413 P. 2d 852, on rehearing, 64 Cal. 2d ....., 64 Adv. Cal. 819, 51 Cal. Rptr. 689, 415 P. 2d 33; *Thomas v. Goulias*, 64 Cal. 2d ....., 64 Adv. Cal. 601, 50 Cal. Rptr. 910, 413 P. 2d 854; *Grogan v. Meyer*, 64 Cal. 2d ....., 64 Adv. Cal. 589, 50 Cal. Rptr. 901, 413 P. 2d 845; *Redevelopment Agency v. Buckman*, 64 Cal. 2d ....., 64 Adv. Cal. 603, 50 Cal. Rptr. 912, 413 P. 2d 856.

tinction between the parties. Rather, it would have been brought about by the fortuitous, perhaps even whimsical or arbitrary, choice of which of the parties should seek, and the cases in which they should seek the writ of certiorari.[24] The parties should not be subjected to the risk of this inconsistent eventuality.

Second: Finality in the appellate sense is, of course, an essential ingredient of this Court's jurisdiction to review a state court judgment. [28 U.S.C., § 1257(3); *Market Street R. Co. v. Railroad Com.*, 324 U.S. 548, 551.] While the judgment in *Prendergast* is final in that sense, the judgment in *Mulkey* is not. The latter judgment reverses the judgment of the trial court. The case, therefore, is one that has never been tried or decided on the merits; the issues of fact in it have never been resolved. The judgment sought to be reviewed did not resolve those issues. Neither did the judgment that was reversed, for that judgment was rendered on the pleadings alone. [*App.*, 36.] The effect of the reversal was to remand the case for trial, leaving the parties as

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[24]The seven cases proceeded in the State Supreme Court as one. The attorneys who appear here for the petitioners appeared there in all seven cases, either as attorneys for the property-owner parties or for the California Real Estate Association, *amicus curiae* in behalf of those parties. [See, 64 Adv. Cal. at 559, 589, 591, 594, 598, 601, 604.] The brief prepared by those attorneys was filed in each of the seven cases. The property-owner parties represented by other attorneys either did not appear at all [see, *e.g.*, 64 Adv. Cal. at 589, 601] or joined in that brief.

The court below could, of course, notice its own records in these cases. [*Flores v. Arroyo*, 56 Cal. 2d 492, 496, 15 Cal. Rptr. 87, 89-90, 364 P. 2d 263, 265-266; *People v. Rojas*, 57 Cal. 2d 676, 679-680, 21 Cal. Rptr. 564, 566, 371 P. 2d 300, 302.] So, therefore, may this Court. [Cases cited, note 4, p. 3, *supra*.] Accordingly, we attach as an appendix to this brief a reproduction of the cover page of the principal brief filed below in opposition to those who were asserting the invalidity of section 26. From it the Court's judicial knowledge of the statements of fact made in this note may be informed.

though there had been no judgment. [*Central Sav. Bank v. Lake,* 201 Cal. 438, 443, 257 Pac. 521, 523.] The requisite finality, therefore, is lacking. [*Southern Pacific Co. v. Gileo,* 351 U.S. 493, 495-496; *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 381-382; *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547.]

Thus, the case in which the main and controlling opinion of the court below was written is not and cannot be properly here. It was that case that raised squarely the question of the applicability of section 26 as a defense to a racially grounded refusal to rent. Without that case and its factual record, the question of the constitutionality of section 26 will be here on only a part of the record upon which the court below acted. Review of a question presented by petitioners as one of overwhelming importance ought not to be had on an incomplete record.

Conclusion.

The petition for a writ of certiorari to the Supreme Court of the State of California should be denied.

Respectfully submitted,

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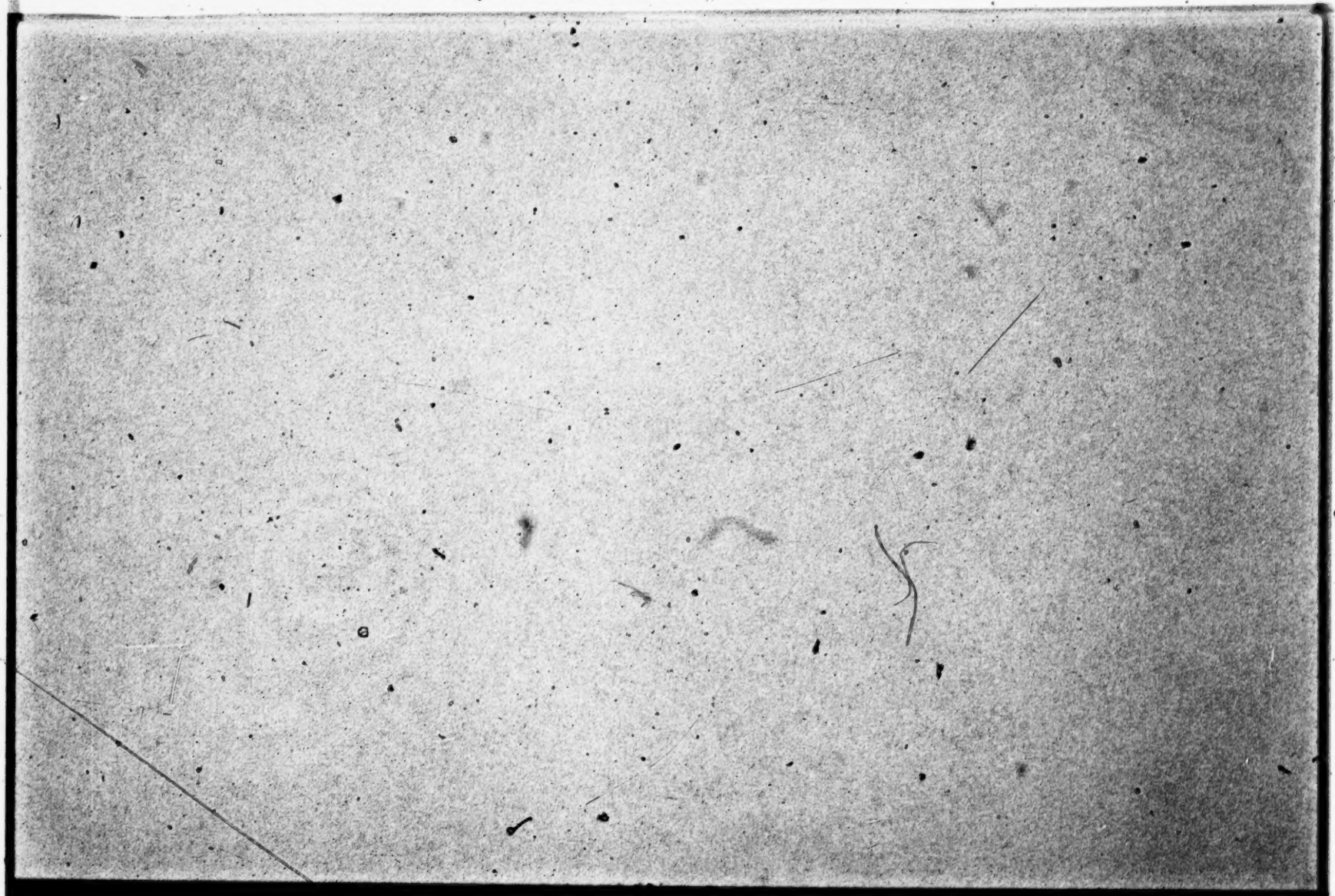

L. A. Nos. 28360, 28422, and 28449

In the Supreme Court of the State of California

L.A. No. 28360

LINCOLN W. MULKEY, *et al.*,

Plaintiffs and Appellants,

vs.

NEIL REITMAN, *et al.*,

Defendants and Respondents.

Appeal From the Superior Court of Orange County
Honorable Raymond Thompson, Judge

BRIEF OF RESPONDENTS

L. A. No. 28422

WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST, on behalf of themselves and all persons similarly situated,

Cross-Defendants and Respondents,

vs.

CLARENCE SNYDER,

Cross-Complainant and Appellant.

Appeal From the Superior Court of Los Angeles County
Honorable Martin Katz, Judge

APPELLANT'S OPENING BRIEF

L. A. No. 28449

THOMAS ROY PEYTON, M.D.,

Plaintiff and Appellant,

vs.

BARRINGTON PLAZA CORPORATION,

Defendant and Respondent.

Appeal From the Superior Court of Los Angeles County
Honorable Martin Katz, Judge

BRIEF OF RESPONDENT

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(Continued on Inside Cover.)

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Brief of California Real Estate Association as Amicus Curiae in the Following Cases:

SAC. No. 7657

CLIFTON HILL,

Plaintiff and Appellant,

vs.

CRAWFORD MILLER,

Defendant and Respondent.

Appeal From the Superior Court of Sacramento County
Honorable William Gallagher, Judge

S. F. No. 22019

DORIS R. THOMAS,

Plaintiff and Appellant,

vs.

G. E. GOULIAS, *et al.*,

Defendant and Respondent.

Appeal From the Municipal Court of the City and County of San Francisco
Honorable Robert J. Drewes, Judge; Honorable Leland J. Lazarus, Judge, and Honorable Lawrence S. Mana, Judge

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S. F. No. 22020

JOYCE GROGAN,

Plaintiff and Appellant,

vs.

ERICH MEYER,

Defendant and Respondent.

Appeal From the Municipal Court of the City and County of San Francisco
Honorable Robert J. Drewes, Judge; Honorable Leland J. Lazarus, Judge, and Honorable Lawrence S. Mana, Judge

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S. F. No. 22017

REDEVELOPMENT AGENCY OF THE CITY OF FRESNO, a public body, corporate and politic,

Petitioner,

vs.

KARL BUCKMAN, Chairman of the Redevelopment Agency of the City of Fresno,

Respondent.

PETITION FOR WRIT OF MANDATE.

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